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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,) No. CR 07-00610 JF
)
Plaintiff,)
) DEFENDANT'S REPLY TO
v.) GOVERNMENT'S SENTENCING
) MEMORANDUM
BERNADETTE ESCUE,)
)
Defendant.)
) Date: May 8, 2008
) Time: 1:30 p.m.

INTRODUCTION

By this memorandum, counsel for Ms. Escue will respond briefly to the *United States' Sentencing Memorandum* (Doc. 30; hereinafter "*Govt's Memorandum*"). Further response will be provided at the sentencing hearing.

DISCUSSION

Initially, the Government proposes equating the guidelines calculations under various scenarios. See *Govt's Memorandum* at 2:10-25. This puts the cart before the horse, for in taking this approach the Government focuses on numbers, rather than on the principles from which the correct numbers are to be derived, and thereby sacrifices principle for a particular desired numerical conclusion. This methodology might be understandable if the plea had been entered under Rule 11(c)(1)(C), but it was not. The principles that form the basis of the plea agreement (i.e., the agreed upon loss amount and the agreement that no "abuse of trust" increase applies), combined with the *ex post facto* principle enshrined in the Constitution, rightly govern. The Government's position otherwise – and its position that it doesn't matter – distort and avoid the proper analysis.

1 The Government's further discussion and position (*see Govt's Memorandum* at 3:1-4:27) is
 2 marked by a focus on the guidelines calculations that is no longer current, having been repudiated at
 3 length by the Supreme Court's and the Ninth Circuit's decisions in the wake of *Booker*. The
 4 Government's orientation with its emphasis on the guidelines range essentially presumes that the
 5 guidelines range is reasonable, which the Courts have rejected expressly and emphatically. *Gall*, 128
 6 S.Ct. at 596-97 ("[The District Court] may not presume that the Guidelines range is reasonable."), citing
 7 *Rita*, 551 U.S. at ---, 127 S.Ct. 2456; *Carty*, 2008 WL 763770 at *4 ("The district court may not
 8 presume that the Guidelines range is reasonable."), citing *Rita*, 127 S.Ct. at 2465; *Booker*, 543 U.S. at
 259-60, 125 S.Ct. 738; *Gall*, 128 S.Ct. at 596-97.

9 Perhaps most glaringly absent from the Government's discussion is its failure to mention or
 10 consider the overarching directive of 18 U.S.C. § 3553(a), by which the Court "shall impose a sentence
 11 sufficient, but not greater than necessary," to comply with purposes of sentencing. *Kimbrough*, 128
 12 S.Ct. at 570 ("The statute ... contains an overarching provision instructing district courts to 'impose a
 13 sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing"); *Carty*,
 14 2008 WL 763770 at *3 ("The overarching statutory charge for a district court is to 'impose a sentence
 15 sufficient, but not greater than necessary'"). The Government's discussion also fails to acknowledge
 16 several key statutory principles relevant to sentencing, which the cases have clarified as essential and
 17 important in imposing a sufficient, appropriate sentence. *See Defendant's Sentencing Memorandum*
 18 (Doc. 29) at 3:11-5:16 (citing and discussing statutory and case law which holds that extraordinary
 19 circumstances aren't required to justify a sentence outside the guidelines range, that probationary
 20 sentences constitute substantial restrictions on a defendant's liberty and may well be sufficient, and that
 21 imprisonment is not an appropriate means of promoting correction and rehabilitation).

22 The Government's discussion also ignores a number of the § 3553(a) factors, including the
 23 history and characteristics of the defendant (§ 3553(a)(1)), the kinds of sentences available (§
 24 3553(a)(3)), any pertinent policy statement issued by the Sentencing Commission (§ 3553(a)(5)), and –
 of particular relevance to this case – the need to provide restitution to any victims (§ 3553(a)(7)).

25 Having all the relevant factors and principles in mind, the Court should reject the Government's
 26 recommendation for prison as unnecessary and excessive.

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CONCLUSION

Post-*Booker*, the District Court is called upon to tailor the individual sentence in each case in light of all the factors and concerns set forth in the sentencing statutes and the cases which interpret them. *Kimbrough*, 128 S.Ct. at 570, citing *Booker*, 543 U.S. at 245-46, 125 S.Ct. 738. Ms. Escue respectfully requests that the Court do so here, as detailed more extensively in the defense's earlier-filed memorandum (Doc. 29). A probationary sentence which imposes significant, well-considered conditions and which allows her to continue to work so that she may pay restitution truly will be sufficient and appropriate, and will do justice and serve society far better than a sentence that involves prison.

Dated: May 5, 2008

Respectfully submitted,

/S/
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BERNADETTE ESCUE